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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator for the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation,

Petitioner,

vs.

SFR INVESTMENTS POOL 1, LLC,

Respondent.

CASE NO.: 2:17-cv-00914-GMN-PAL

REPLY IN SUPPORT OF CROSS-MOTION FOR AN ORDER REQUIRING RESPONDENT TO COMPLY WITH THE SUBPOENA

The Federal Housing Finance Agency ("FHFA," the "Conservator," or "Petitioner") respectfully submits this Reply in support of its Cross-Motion for an Order Requiring Respondent SFR Investments Pool 1, LLC ("Respondent") to Comply with the Subpoena (ECF No. 17).

As we have explained, to advance its statutory power to preserve and conserve the Enterprises' assets and property, FHFA seeks to identify all properties in which both Respondent (or an affiliate) and an Enterprise claim competing interests, so that FHFA and the Enterprises can take appropriate action to resolve the competing claims and protect the Enterprises' interests. FHFA and the Enterprises cannot compile this information on their own; Respondent obviously has more complete information about the properties in which it and its affiliates claim interests than FHFA or the Enterprises do. For that reason, FHFA propounded a simple, two-page Subpoena (ECF No. 1-2, Ex. 1) asking Respondent to produce documents sufficient to show the properties in which it or an affiliate claims an interest arising out of an HOA foreclosure sale, along with certain information relating to the nature and history of the claimed interests.

Respondent has consistently refused to comply and has produced no meaningful responsive information; it now argues that the Subpoena should be quashed.

Respondent bases its Opposition (ECF No. 21) ("Opp.") largely on the premise that it possesses no materials responsive to the subpoena and that it could obtain responsive materials only by searching public records. Put simply, this is not credible. As an entity whose entire business model revolves around investing in property, Respondent surely maintains records of the properties in which it has invested. Respondents' own Declaration admits as much, saying that "SFR owns approximately 650 parcels of real property and *maintains records related to them* . . . in the ordinary course of SFR's business." Hardin Decl. ¶ 6 (Ex. A to Resp.'s Opp.) (ECF No. 20-1) (emphasis added). Further casting doubt on Respondent's purported concerns about the burden and cost of compliance is the fact that a similarly situated entity, LN Management LLC, has agreed to respond within the next two weeks to a virtually identical subpoena.[1] Yet Respondent has consistently refused to produce *any* records and instead insists that the Court take the drastic step of quashing the entire subpoena. Because Respondent has not satisfied its burden to show that the subpoena is unenforceable, the Court should grant FHFA's Cross-Motion and deny Respondent's Motion to Quash.

ARGUMENT

Respondent makes no serious attempt to address the legal standards applicable to the enforcement of an administrative subpoena. As FHFA explained, the Court's inquiry is "narrow," evaluating: "(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." FHFA Cross-Mot. at 7 (ECF No. 17) (quoting *FDIC v. Garner*, 126 F.3d 1138, 1142 (9th Cir. 1997)). If these requirements are satisfied, the burden falls on the respondent to prove that the subpoena is "unreasonable because it is overbroad or unduly burdensome." *Id.* (quoting *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428

[1] Counsel for FHFA and counsel for LN Management have entered a stipulation pursuant to which LN Management has agreed to produce all responsive documents in its possession by July 19, 2017. A written stipulation is expected to be filed imminently in FHFA v. LN Management, LLC, Case No. 2:17–cv-00910-APG-VCF.

(9th Cir. 1983) (en banc), *overruled on other grounds as recognized in Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994)). Because Respondent is seeking to quash the subpoena in its entirety rather than merely limiting it, its burden is especially heavy. "The quashing of a subpoena is an extraordinary measure, and is usually inappropriate absent extraordinary circumstances. . . . Consequently, [Respondent's] burden is greater for a motion to quash than if [it] were seeking more limited protection." *Flanagan v. Wyndham Int'l Inc.*, 231 F.R.D. 98, 102 (D.D.C. 2005).[2]

Rather than addressing the applicable legal standards, Respondent bets heavily on its theory that FHFA is trying to force Respondent to carry out a public record search that FHFA should do itself. In the process, Respondent relies on factors that are irrelevant to the controlling legal standards, such as the size of FHFA's budget (Opp. at 2-3), the possibility that Respondent might overlook a property (Opp. at 8), and repeated, unsupported assertions about what Respondent believes to be FHFA's "responsibility" (Opp. at 2, 6, 8, 9).[3] As discussed in more detail below, Respondent's meritless arguments fail to provide any basis for quashing the subpoena or for denying FHFA's motion to enforce the subpoena.

A. The Subpoena Does Not Exclusively Request Public Records, and Respondent Is Better Positioned than FHFA to Perform Any Public Record Searches That Might Be Required.

Respondent argues that the only records responsive to FHFA's subpoena are publicly recorded documents and that FHFA can search public records just as easily as Respondent. *See, e.g.*, Opp. at 2-3. This argument is flawed for at least two reasons.

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[2] Typically, when a subpoena recipient genuinely believes that a particular subpoena request is overly burdensome, it will reach out to the issuing agency or the court to discuss narrowing the subpoena. Respondent has not done this. Ever since its initial response to the Subpoena on January 27, 2017, in which Respondent "decline[d] to produce the information and documents requested in the subpoena," (Letter from Jacqueline A. Gilbert, Ex. 4 to Subpoena (ECF No. 1-2)) Respondent's position has been that it will not comply with *any* of the Subpoena requests and that the Subpoena must be entirely quashed.

[3] Respondent presumably is no longer pursuing the meritless statute of limitations argument from its Motion to Quash, *see* Mot. to Quash at 11-12, since there is no discussion of it in the Reply.

First, nothing in the Subpoena or in Nevada law requires the production of publicly recorded documents as opposed to records that Respondent keeps in the ordinary course of business. The Subpoena asks Respondent to identify its properties and produce "documents sufficient to show" certain information about each property (ECF No. 1-2, Ex. 1), but it neither states nor implies that these documents must be public records. To be clear, FHFA believes that documents kept in the ordinary course of Respondent's business, and not only public records, qualify as "sufficient to show" the information requested in the subpoena. And Respondent admits in its own Declaration that it possesses at least some records, stating that "SFR owns approximately 650 parcels of real property and *maintains records related to them* . . . in the ordinary course of SFR's business." Hardin Decl. ¶ 6 (Ex. A to Resp.'s Opp.) (ECF No. 20-1) (emphasis added).

Respondent argues that because Nevada law requires the recording of property conveyances, the Subpoena must be construed as seeking public records, since other records supposedly would not establish Respondent's ownership interests. Opp. at 2-3. However, for purposes of the subpoena, FHFA need not show that the requested documents would be adequate to prove ownership under Nevada law in a later judicial proceeding. "[A] party may not defeat agency authority to investigate with a claim that could be a defense if the agency subsequently decides to bring an action against it." *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001). Nor do the purported requirements of Nevada law govern the interpretation of the subpoena, which was issued pursuant to a federal statute, 12 U.S.C. § 4617(b)(2)(I). Thus, to the extent that Respondent's arguments depend on the incorrect premise that only public records can satisfy the Subpoena, they should be disregarded.

Second, even assuming *arguendo* that Respondent's own records are not adequate to comply fully with the Subpoena, Respondent still would be in a better position than FHFA to obtain whatever public records might need to be obtained. Respondent surely has in its possession *some* materials that are responsive to the Subpoena, which means that the number of documents that Respondent must obtain from public records most likely is significantly fewer than FHFA would need to obtain. If nothing else, Respondent must possess a complete list of its

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own properties, which means that Respondent, unlike FHFA, would be able to search public records with confidence that it knows the full universe of properties at issue.[4] It is simply not plausible that an entity like Respondent, whose entire business model revolves around the purchase of real property, possesses no records about these properties and would need to search public records from scratch.

Respondent's arguments about the size of FHFA's budget compared to Respondent's budget, Opp. at 2-3, are legally irrelevant because, as explained above, this is not part of the test for enforcement of an administrative subpoena.[5] Moreover, Respondent is greatly exaggerating the cost of compliance by claiming that the only way to respond to the Subpoena is to retrieve public records.[6] But in any event, whatever burden might be involved in compiling information about properties that Respondent or an affiliate claims to own will surely be less for Respondent, who already knows about each such property, than for FHFA, who does not. As a result, Respondent's exaggerated cost estimates—even if taken at face value—in no way suggest that FHFA could somehow identify the properties more efficiently. At bottom, Respondent's position, stripped of its overheated rhetoric, is risible; it is simply not credible to suggest that FHFA could somehow identify more efficiently than Respondent the list of properties in which Respondent claims an interest arising from an HOA foreclosure sale.

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[4] Respondent dismisses FHFA's statements about its counsel's attempts to search public records as "hearsay" that should be stricken. Opp. at 3. Even assuming *arguendo* that FHFA's statements about its own counsel's actions are "hearsay," "[g]enerally, declarations accounting for searches of documents that contain hearsay are acceptable" as long as the agency official making the declaration supervised the search process. *Kay v. FCC*, 976 F. Supp. 23, 34 (D.D.C. 1997) (citing *SafeCard Serv., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991)).

[5] If this factor were relevant, then presumably the only enforceable administrative subpoenas would be those issued to large corporations with budgets comparable to those of federal agencies.

[6] Respondent's calculation of costs relies on an attorney's billing rate, without considering the possibility that a paralegal or law clerk could do at least some of the work at a significantly lower rate. *See* Kim Decl. ¶ 1 ("I am an attorney with Kim Gilbert Ebron . . . ."), ¶ 10 ("I estimate that I will have to bill SFR $450 per property . . . .") (Ex. 2 to Opp.) (ECF No.

B. FHFA Does Not Possess the Requested Information and Documents and Cannot Easily Obtain Them

Respondent makes an assortment of arguments to the effect that FHFA either possesses or can easily obtain the information and documents sought in the Subpoena. All of these arguments lack merit.

Respondent argues that FHFA "constructively possesses" the information in the Subpoena because it has access to the deeds of trust for Enterprises' properties. Opp. at 4. As FHFA explained in its Cross-Motion, however, the Enterprises have hundreds of thousands of properties in Nevada, and FHFA, unlike Respondent, does not know the universe of properties in which Respondent might claim an interest. Cross-Mot. at 11-12. Thus, FHFA does not possess, constructively or otherwise, the information requested in the Subpoena, and it has supported this statement with a sworn declaration by its General Counsel, which satisfies any burden that FHFA might have to show that it does not possess the information. *See* Cross-Mot. at 13 (citing *Stewart v. United States*, 511 F.3d 1251, 1254 (9th Cir. 2008)). In contrast, Respondent admits that it keeps records for its properties, but it refuses to produce any of them, making the incorrect (and self-serving) argument that public records are the only documents that are responsive to the Subpoena.

Respondent argues that FHFA can identify a comprehensive list of properties by entering "SFR Investments Pool 1, LLC" into the search page of the Clark County Assessor's website and that any records not recorded under this name due to "scrivener's error" can be handled "on a case-by-case basis." Opp. at 6 & n.5. First, Respondent's statement about the ease of searching the website is demonstrably false, as the Court can easily verify. A search for "SFR Investments Pool 1, LLC" produces no results. Only by entering spaces between the letters (i.e., "S F R" and "L L C") does the search produce any results at all. Second, even a search for "S F R Investments Pool 1, L L C" does not appear to produce all relevant results, since searches for various other terms produce results such as "S F R Investment Pool 1 L L C" and "S F R Investments Pool I L L C" (with a Roman numeral "I"), in addition to more significant variations

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20-2).

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such as "S F R Fund L L C" and "S F R Properties L L C." If there are even more significant variations, they might not be captured in any search that FHFA could reasonably devise, making it impossible for FHFA to address these issues on a "case-by-case basis," as Respondent proposes. In any event, there is no reason why FHFA should be left guessing about these things when Respondent knows which properties it has purchased and admits that it keeps records related to them.

Respondent also argues that FHFA should exclude from the Subpoena certain properties, such as those that have already been through litigation. Opp. at 7. Respondent fails to mention the fact that FHFA has done just that, having excluded 124 properties from the scope of the Subpoena precisely because they are the subjects of litigation. *See* Cross-Mot. at 3. If Respondent believes that additional categories of properties should be excluded from the Subpoena, it can raise this issue with FHFA or present the argument to the Court, but Respondent instead has called for the entire Subpoena to be quashed.

Respondent also claims that it "responded to the subpoena in January 2017 and sought to resolve the matter at that time, even providing responses to a number of requests in the subpoena." Opp. at 7. This is inaccurate and disingenuous. Respondent's January 2017 response flatly stated that "SFR declines to produce the information and documents requested in the subpoena," and it was not accompanied by any information or documents. (ECF No. 1-2, Ex. 4.)[7] At no point has Respondent made a good faith effort to provide even a partial response to the Subpoena.

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[7] To the extent that Respondent provided any "responses" to requests in the Subpoena that were not simply objections, these responses were conclusory and evasive. For example, the Subpoena asks that Respondent provide, for each property, "the nature and extent of Your actual or claimed interest." Subpoena ¶ B.1(g). SFR responded: "Pursuant to Nevada law, SFR obtained state-recognized property interests in the properties it purchased at HOA foreclosure sales," Gilbert Letter at 2, a response that identifies neither the properties nor any meaningful information about the nature of the interest.

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C. Respondent's Purported Fear of Liability Is Not a Reason to Avoid Responding to the Subpoena

Respondent argues that it should not be required to respond to the Subpoena at all, because if it "overlooks a property or two in response to the subpoena" in good faith, it might be subject to liability. Opp. at 8. Of course, taken to its logical conclusion, this argument would mean that virtually no one should ever be required to respond to administrative subpoenas, because there is always a risk of inadvertently missing a document. In fact, parties who inadvertently overlook a document when responding to a subpoena can simply supplement their responses later, without being subject to sanctions or attorney's fees, provided that there is no evidence of bad faith. Respondent invites far greater legal risk by refusing to comply with the Subpoena than by making a good faith effort to comply. *See* 12 U.S.C. § 4588 (discussing court power to enforce FHFA's subpoenas); *In re W. States Wholesale Natural Gas Antitrust Litig.*, Nos. 2:03-cv-1431, 2:07-cv-01919, 2:05-cv-01331, 2016 WL 3965185, at *3 (D. Nev. July 22, 2016) (explaining that "[f]ailure to comply with a federal subpoena may be prosecuted as criminal contempt").

CONCLUSION

For the reasons stated above and in FHFA's previous filings in this matter, FHFA respectfully requests an Order directing Respondent to comply with the Subpoena and denying Respondent's Motion to Quash the Subpoena.

DATED: July 10, 2017.

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CERTIFICATE OF SERVICE

Pursuant to F.R.C.P. 5(b) and Electronic Filing Procedure IV(B), I certify that on July 10, 2017, a true and correct copy of the **REPLY IN SUPPORT OF CROSS-MOTION FOR AN ORDER REQUIRING RESPONDENT TO COMPLY WITH THE SUBPOENA,** was transmitted electronically through the Court's e-filing electronic notice system to the attorney(s) associated with this case. If electronic notice is not indicated through the court's e-filing system, then a true and correct paper copy of the foregoing document was delivered via U.S. Mail.

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